

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEREMIAH NERO : CIVIL ACTION NO. 97-2721
 :
 v. : (CRIMINAL NO. 91-321-02)
 :
 UNITED STATES OF AMERICA :

MEMORANDUM ORDER

Presently before the court is petitioner's petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, which the government opposes.

Petitioner was indicted with nineteen others for conspiring to distribute Columbian cocaine as part of a large scale, multi-state, multi-million dollar drug distribution enterprise directed by co-defendant Julian Claude Dumas, Jr. from Los Angeles. Petitioner was convicted after a jury trial on January 27, 1992 of distributing and of conspiring to distribute and possess with intent to distribute substantial quantities of cocaine. With a total offense level of 41, petitioner faced 324 to 405 months of imprisonment.

Petitioner was sentenced on August 20, 1992 to 324 months of imprisonment, to be followed by five years of supervised release. Petitioner's conviction and sentence were affirmed on July 13, 1993.

Petitioner contends that his counsel was ineffective in not challenging the amount of cocaine attributed to him or the conclusion that he played a managerial role in the drug distribution organization. Petitioner contends that his counsel also was ineffective for not interviewing cooperating co-conspirator Dennis Hamilton, for not cross-examining cooperating co-conspirator Allen Smith and for not further cross-examining separately charged cooperating co-conspirator Charles Porter.

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; U.S. v. Nino, 878 F.2d 101, 103 (3d Cir.1989).

The attribution of 227 kilograms of cocaine to petitioner was quite conservative. The evidence of record was

more than ample to support a finding that petitioner was aware of the full scope and scale of distribution by the Dumas organization. Nevertheless, the only amounts attributed to petitioner for sentencing purposes were the 77 kilograms directly linked to him and the 150 kilograms he personally saw stored at a co-conspirator's residence which he clearly knew were for distribution to others. It was not unreasonable for counsel to decline to challenge the attribution of this amount, and petitioner was in no way prejudiced as any objection would have been unavailing. The same is true of the three level enhancement pursuant to U.S.S.G. § 3B1.1 for having a managerial or supervisory role.

Petitioner assisted in the recruitment of couriers for the organization, including Dennis Hamilton who transported 338 kilograms of cocaine and large amounts of cash. Another courier, Michael Patin, delivered cocaine to Philadelphia in August 1990 at petitioner's direction. Mr. Patin reported to petitioner with \$250,000 from the delivery of cocaine to Chicago in July 1990 upon his return to Los Angeles. More importantly, the evidence of record shows that petitioner exercised considerable authority and influence over others in the organization as a principal lieutenant of Mr. Dumas, the kingpin.

There is absolutely no showing that Mr. Hamilton was willing to submit to a pretrial interview by petitioner's

counsel. A defense counsel's decision not to seek to interview represented co-defendants who agreed to cooperate against those defendants proceeding to trial is not on its face unreasonable or unusual. Petitioner's counsel received all of the Jencks material for Mr. Hamilton. No basis is provided or even suggested remotely to show that in an interview with counsel Mr. Hamilton would have recanted or elaborated upon his prior statements in any way helpful to petitioner or would have said anything inconsistent with his trial testimony. There is no demonstration of professional deficiency or prejudice regarding the handling of Mr. Hamilton by petitioner's counsel.

Petitioner suggests that through cross-examination of Mr. Smith, a cooperating co-defendant who purchased cocaine from Mr. Porter, counsel could have obtained information with which to impeach Mr. Porter and could have recalled Mr. Porter for further cross-examination to attempt to impeach his testimony. Whether and how to conduct cross-examination of witnesses is a tactical decision that is within the discretion of trial counsel.

Government of the virgin islands v. Weatherwax. 77 F.3d 1425, 1434 (3d Cir.), cert. denied, 117 S. ct. 538 (1996).

Petitioner makes no showing of what testimony Mr. Smith would have given to impeach, even collaterally, the testimony of Mr. Porter. Counsel for petitioner and for other trial defendants effectively questioned Mr. Porter, who acknowledged

purchasing 300 kilograms of cocaine from the Dumas organization, about his self-interest in testifying for the government, about his own extensive illegal activities and about the reliability of the drug business records he produced. Mr. Porter was a very convincing and resolute witness. To attempt to get him to change with further cross-examination his factual recitation of events on direct examination would have merely underscored that recitation and been a quite dubious tactic.

Petitioner has not demonstrated that his attorney was professionally deficient, let alone that he was prejudiced by professionally unreasonable conduct which undermined the proper functioning of the adversarial process.

ACCORDINGLY, this day of June, 1998, **IT IS HEREBY ORDERED** that petitioner's petition to vacate, set aside or correct his sentence is **DENIED** and the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.